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# NOT TO BE PUBLISHED IN OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| **INSURANCE ASSOCIATES OF NORTHERN CALIFORNIA,**<br>**Cross-complainant and Appellant,**<br>**v.**<br>**ROYAL INDEMNITY COMPANY,**<br>**Cross-defendant and Respondent.** | **A123055**<br><br>**(Lake County Super. Ct. No. CV401267)** |

This appeal follows a successful motion for judgment on the pleadings made by respondent Royal Indemnity Company (Royal), individually and as successor to Globe Indemnity Company (Globe). The motion was directed at a cross-complaint filed by appellant Insurance Associates of Northern California (Insurance Associates) seeking reformation of an insurance policy (the Policy) issued by Globe to Cobb Valley Ranch & Development Company (Cobb Valley). Insurance Associates was the insurance broker that obtained the Policy for Cobb Valley. The underlying complaint was filed against Globe, Royal, and Insurance Associates by Mike Rudden (Rudden), who did business as Cobb Valley, and Fred and Helen Serb (the Serbs), who previously sued Rudden regarding a home construction project. Rudden and the Serbs (hereafter plaintiffs) alleged that Royal wrongfully denied coverage under the Policy and that Insurance

Associates failed to obtain the proper coverage in the Policy. Subsequently, Royal settled with plaintiffs.[1]

The trial court concluded that Royal's settlement with plaintiffs terminated any coverage issues arising from the Policy. We affirm, because Insurance Associates has not shown that its reformation claim will affect its liability for its alleged negligence in drafting the Policy.

## BACKGROUND[2]

Rudden, doing business as Cobb Valley, was a building contractor in Lake County. In 1988, Insurance Associates prepared the Policy for Rudden providing coverage from Globe related to Cobb Valley business activities. Royal is successor in interest to Globe.

In 1989, Rudden contracted with the Serbs to construct a home for them. A dispute arose about Rudden's work, and, in June 2002, the Serbs sued Rudden in a prior action for breach of contract, fraud, and negligence. (*Serb v. Rudden* (Super. Ct. Lake County, 2004, No. 42666) (the Serb action).)

Rudden tendered the defense of the Serb action to Royal, and Royal ultimately denied the claim on the ground that Rudden was not an insured under the Policy because the Policy was issued to Cobb Valley as a partnership. In fact, at the time the Policy issued, Cobb Valley was not a partnership; instead, Rudden was doing business as Cobb Valley. The description of Cobb Valley as a partnership was a clerical error made by Insurance Associates. All parties to the contract intended to provide coverage for Rudden, individually and doing business as Cobb Valley as a sole proprietorship.

After Royal disclaimed coverage, Rudden, Cobb Valley, and the Serbs entered into a settlement agreement resulting in entry of a stipulated judgment for $125,000

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[1] Plaintiffs are not parties to this appeal.

[2] Our recitation of facts is based on the allegations in Insurance Associates' cross-complaint, "which we must accept as true in this appeal from a judgment entered on the pleadings. [Citation.]" (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1315, fn. 1 (*Third Eye Blind*).)

against Rudden and Cobb Valley, and Rudden and Cobb Valley assigned to the Serbs their claims of liability in that amount against Globe and Insurance Associates.

Rudden and the Serbs subsequently commenced the present action, filing in April 2005 a first amended and operative complaint asserting claims against Globe and Royal for denying coverage to Rudden (including causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing) and against Insurance Associates for not obtaining the proper coverage (including causes of action for breach of contract and negligence). Royal cross-complained against Insurance Associates, asserting causes of action for equitable subrogation, indemnity, and contribution, as well as a declaratory relief cause of action seeking a "determination of the respective rights, liabilities, and duties" of Royal and Insurance Associates. Insurance Associates cross-complained against Royal for reformation of the Policy to reflect the contracting parties' intent to provide coverage for Rudden, individually and doing business as Cobb Valley as a sole proprietorship.

Royal ultimately settled with the plaintiffs. Royal paid plaintiffs $85,000 and assigned to them Royal's rights under its cross-complaint against Insurance Associates. The plaintiffs dismissed their lawsuit as to Royal and substituted themselves into Royal's cross-complaint against Insurance Associates, replacing Royal as the cross-complainants. The trial court granted Royal's motion for a determination that the settlement was in good faith.[3]

Royal filed a motion for judgment on the pleadings on the grounds that Insurance Associates lacks standing to seek reformation of the Policy and Royal's settlement with the plaintiffs rendered moot all issues under the Policy. Royal also argued in its reply brief below that the reformation claim was untimely. The trial court granted the motion

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[3] In its ruling on the motion for good faith settlement, the trial court granted Royal's request for dismissal of Insurance Associates' cross-complaint. Insurance Associates filed a petition for writ of mandate and this court directed the trial court to set aside the dismissal because Royal's motion was not the appropriate procedural vehicle for dismissal of the cross-complaint.

and entered judgment in favor of Royal, dismissing the cross-complaint without leave to amend. The court's ruling concluded that "[Royal's] settlement with plaintiffs (Rudden and [the Serbs]) has terminated the issue of coverage." The court indicated that, had that issue not been dispositive, it would have granted leave to amend to allow Insurance Associates to address the standing and statute of limitations issues.

DISCUSSION

Insurance Associates contends the trial court erred in granting the motion for judgment on the pleadings because resolution of its reformation claim will affect the amount of any damages it ultimately owes to plaintiffs due to its alleged negligence in drafting the Policy.

Reformation is an equitable remedy that permits a court to reform a contract or deed. "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." (Civ. Code, § 3399.) Reformation is proper when the parties come to an actual agreement, but by reason of fraud or mistake, that intent is not expressed in the written instrument. (*Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 699.) The burden is on the party seeking reformation to demonstrate that the true intent of the agreement was something other than what is reflected in the instrument. (*Id.* at p. 700.) An insurance policy may be reformed to show "the persons included in the coverage." (*Modica v. Hartford Acc. & Indem. Co.* (1965) 236 Cal.App.2d 588, 595; see also *Jackson v. Aetna Life & Casualty Co.* (1979) 93 Cal.App.3d 838, 840, 847-848.)

Code of Civil Procedure section 438 provides that a party may move for a judgment on the pleadings in any civil action. "In the trial court, ' "A defendant is entitled to judgment on the pleadings if the plaintiff's complaint does not state a cause of action. In considering whether a defendant is entitled to judgment on the pleadings, we look only to the face of the pleading under attack . . . . All facts alleged in the complaint

are admitted for purposes of the motion, and the court determines whether those facts constitute a cause of action. The court also may consider matters subject to judicial notice. [Citations.]" [Citations.]' [Citation.] On appeal, 'Review of a judgment on the pleadings requires the appellate court to determine, de novo and as a matter of law, whether the complaint states a cause of action. [Citation.] For purposes of this review, we accept as true all material facts alleged in the complaint. [Citation.]' [Citation.]" (*Third Eye Blind, supra*, 127 Cal.App.4th at p. 1317.)

In this case, Insurance Associates seeks reformation of the Policy to match the contracting parties' alleged intent to provide coverage to Rudden, which is consistent with plaintiffs' construction of the Policy in the first amended complaint. The trial court did not conclude that Insurance Associates failed to allege the elements of a viable reformation claim. Instead, it granted the motion for judgment on the pleadings on the ground that the settlement between Royal and the plaintiffs "terminated the issue of coverage." "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court. [Citations.]" (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453; see also *Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1183.) We agree that the reformation issue is moot, because reformation of the contract to reflect coverage for Rudden would not affect Insurance Associates' liability for its negligence.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), the Brobeck law firm (Brobeck) defended client Jordache in a lawsuit but did not investigate whether there was potential insurance coverage for the suit. (*Id.* at pp. 744-745.) As a result of Brobeck's alleged negligence, Jordache provided its own defense for several years. (*Ibid.*) In addition, because Jordache delayed tendering its defense to the insurer, the insurer raised a "late notice" defense to coverage. (*Id.* at pp. 745-746.) After Jordache settled a coverage lawsuit against the insurer, it sued Brobeck for legal malpractice. (*Id.* at p. 746.) The issue before the Supreme Court in *Jordache*

was when Jordache suffered "actual injury" for purposes of triggering the statute of limitations on the claims against Brobeck. The court concluded that Jordache suffered injury prior to resolution of the coverage suit, because Jordache claimed Brobeck's neglect allowed the insurer to raise an objectively viable defense to coverage, which caused Jordache to incur costs to litigate its coverage claims and also reduced those claims' settlement value. (*Id.* at pp. 743-744.) The court reasoned: "Ultimately, . . . Jordache's insurance coverage litigation could not determine the existence or effect of Brobeck's alleged negligence. As Brobeck notes, the alleged failure to advise Jordache on insurance matters was not at issue in the coverage lawsuits. Thus, the resolution of that litigation would not determine whether Brobeck breached its duty to Jordache. For the same reason, the coverage litigation could not determine the consequences resulting from Brobeck's alleged breach of duty. The coverage litigation's resolution was relevant to Brobeck's alleged negligence only insofar as it potentially affected the amount of damages Jordache might recover from Brobeck." (*Id.* at p. 753.)

Directly on point to the present case is *Third Eye Blind*, *supra*, 127 Cal.App.4th 1311, in which Division Three of this court followed *Jordache* in a case involving the alleged negligence of an insurance broker. There, a music band contracted with its business manager and an insurance broker to obtain a commercial general liability insurance policy for the band. The problem with the policy obtained on the band's behalf was that it "excluded coverage for some liability" under a Field of Entertainment Limitation Endorsement (FELE). (*Id.* at p. 1315.) The FELE exclusion pertained to the very risk the band's professional entertainment work exposed it to and the band "alleged [it] would have obtained an errors and omission policy if [it] had been so advised." (*Id.* at p. 1316.) *Third Eye Blind* held that the trial court's ruling on a motion for summary adjudication that the insurer had breached its duty to defend the band because there was a potential for coverage under the policy, and a subsequent settlement between the band and insurer, did not absolve the broker of liability for its negligence. (*Id.* at p. 1323.) The court concluded that the trial court's ruling "could not absolve [the defendants] of liability for their own alleged negligence in failing to advise [the band] about the need for

errors and omissions insurance," and the ruling and settlement "are relevant to the claims against [the defendants] only insofar as they affect the measure of damages [the band] may recover and whether [the band] properly mitigated [its] damages. [Citations.]" (*Ibid.*)

*Third Eye Blind* also followed *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457 (*Sindell*), in which the plaintiffs, intended beneficiaries of their father's estate, filed a malpractice suit alleging that the law firm that prepared the estate documents negligently failed to obtain consent to the distribution from their father's second wife. As a result, the plaintiffs were embroiled in litigation with the second wife concerning distribution of the estate's assets. (*Id.* at p. 1460.) The *Sindell* court rejected the law firm's argument that the complaint was premature because the probate litigation had not yet determined whether the plaintiffs had suffered any injury. (*Id.* at pp. 1460, 1464-1465.) Instead, the court reasoned the plaintiffs had already sustained injury "by virtue of having to litigate issues which, but for [the] defendants' negligence, would have been resolved," and the outcome of the probate litigation was "relevant only to the *amount* of [the] plaintiffs' damages, not to the *fact* of their injury." (*Id.* at p. 1460.)

The present case is analogous to *Jordache*, *Third Eye Blind*, and *Sindell*. Plaintiffs claim Insurance Associates' negligence caused them, among other things, to incur costs in litigating the coverage issue with Royal. As Insurance Associates appears to acknowledge in its reply brief, reformation of the Policy to reflect coverage for Rudden would not absolve Insurance Associates of liability for its negligence, because Rudden would not have had to litigate that coverage issue had the Policy been drafted properly. (See *Third Eye Blind, supra*, 127 Cal.App.4th at p. 1323 [coverage litigation was a foreseeable result of broker's alleged negligence in failing to obtain adequate insurance coverage].) Nevertheless, Insurance Associates points to the language in *Third Eye Blind* indicating that the coverage ruling and settlement in the case were relevant to the "measure of damages" and whether the band "properly mitigated [its] damages." (*Ibid.*) However, as in that case, there already is a settlement between Royal and plaintiffs to which the trial court may refer in fashioning any damage award against Insurance

Associates for any negligence in drafting the Policy. (See also *Jordache*, *supra*, 18 Cal.4th at p. 753 [settlement of coverage dispute "may have reduced Jordache's damages"]; *Sindell*, *supra*, 54 Cal.App.4th at p. 1470 ["If [the] plaintiffs prevail in the pending litigation, their loss will be limited to their attorney's fees and litigation costs. If they lose, they will have sustained not only those losses, but also the value of [their father's] property which will have to be diverted to [their father's second wife] and her children."].) Insurance Associates does not explain how reformation of the Policy, which would not affect the settlement, could affect any damages award for its negligence. The trial court did not err in concluding the reformation claim is moot.

Insurance Associates' remaining contentions have been forfeited because they are not supported by reasoned arguments with citations to authority. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]"]; see also *Haah v. Kim* (2009) 175 Cal.App.4th 45, 53 [following *Badie* in demurrer context].) First, Insurance Associates argues the reformation claim is not moot because the trial court could award it damages due to Royal's inequitable conduct. But it fails to provide any reasoned argument or authority supporting that proposition; the cross-complaint does not even contain a specific request for damages. Second, Insurance Associates argues that a future, unrelated coverage dispute could arise under the Policy and the statute of limitations might bar it from bringing a reformation action at that time. Notably, the Policy was canceled in 1991, so it only covers occurrences prior to that time. Insurance Associates provides no reasoned argument or authority that it has standing to bring a reformation action where the possibility of a future coverage dispute is entirely speculative. Finally, Insurance Associates contends that its reformation claim is relevant to the declaratory relief action in Royal's cross-complaint. However, Royal's cross-complaint does not ask for a determination of Rudden and Royal's rights and duties under the Policy. Instead, it seeks a "determination of the respective rights, liabilities, and duties" of Royal and

Insurance Associates vis-à-vis each other. Insurance Associates fails to provide reasoned argument to the contrary.

Insurance Associates has not shown the trial court erred in granting Royal's motion for judgment on the pleadings.[4]

DISPOSITION

The trial court's judgment is affirmed. Respondent is awarded its costs on appeal.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

[4] Because we affirm the trial court's ruling on the ground of mootness, we need not consider the standing and statute of limitations issues addressed in the briefing on appeal.